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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

Joseph Robert Stoot,

Petitioner

versus

D & D Catering Service, Inc.,

Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

William P. Rutledge
DOMENGEAUX & WRIGHT
P.O. Box 3668
Lafayette, Louisiana 70502-3668
Telephone: (800) 252-3106

Attorney for Petitioner

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH ROBERT STOOT, Petitioner

v.

D & D CATERING SERVICE, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Joseph Robert Stoot, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on January 15, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals found at 807 F.2d 1197 appears in the appendix A.

The opinion of the district court, United States District Court for the Western District of Louisiana, Lake Charles Division, 618 F.Supp. 1274, appears in the appendix B.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on January 15, 1987. A timely petition for rehearing was denied on February 24, 1987, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the proper standard was used in this Jones Act type case to determine whether a seaman should recover for aggravated assault and battery by a fellow crewman within the confines of the ship.

2. Whether provocation creates an assumption of risk that completely bars a seaman from recovery for injuries sustained when he was knifed.

3. Whether the knifer must be within the course and scope of his employment before the shipowner is vicariously liable.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 45, Section 51 (as amended 1939), and in pertinent part:

> Every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in

whole or part from the negligence of any of the officers, agents, or employees of such carrier. . . .

United States Code, Title 45, Section 51 (as amended 1939), in its entirety:

> ***Every common carrier by railroad***, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, ***shall be liable in damages to any person suffering injury while he is employed by such carrier*** in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, ***for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier***, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and

> substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. [Emphasis added.]

United States Code, Title 46, Section 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

In this "Jones Act" type case, petitioner, seaman Stoot, while in the mess of the vessel, was knifed by the cook. The District Court dismissed with prejudice because it found that the cook was not within the scope of her employment.

The Circuit Court, calling it a close question, concluded that the finding was not clearly erroneous and affirmed. Rehearing was denied.

Plaintiff was a member of the crew of a drilling vessel; a boatswain, so to speak, doing specialized work. He was knifed by the ship's cook while she was in her galley doing ship's cooking. The knifing occurred while plaintiff was empty-handed and totally defenseless, except for his bare hands, which were lacerated as he desperately tried to ward off the blade. Two fingers were hacked off. The questions are: (1) vicarious liability; and, (2) provocation; as a total bar. (And the implied ruling here is surely that the plaintiff was the sole provocateur and that his provocation totally barred recovery.)

Plaintiff Stoots because of the specialized nature of his routine had no routine. He did not go on nor come off watch at any particular time; it was impossible for him to eat at the routine hour. His work made him catch his food when he could. Therein lay the rub.

Every time plaintiff came through the mess line, the cook growled and muttered at him about making her work harder because he did not eat with the other crew members at the regular hours. Plaintiff did not back-talk her, but finally he got tired of hearing her grumble and went to a ship's officer with his plea. The officer reprimanded the cook, pointing out that plaintiff's work made it necessary for him to eat at odd hours. Plaintiff thought the matter was over.

Now come the details of the aggravated assault.

When plaintiff returned to the mess to eat, the cook upbraided him again, for being a snitch, a tattletale, for making it hard on her by going to the officer. She was

standing behind the food table; plaintiff was standing in front of it; plaintiff turned and walked away from her to a water fountain a very short distance, leaned over, took a mouthful of water, raised up, swallowed; and, while the water was still running down his throat, and in a quiet, gentle tone, and as politely and respectfully as the words would permit, told the cook to "Kiss my ass." (No coarseness intended; the quote is from the circuit opinion.)

The cook flew out from the kitchen and started stabbing him with her knife while telling him that nobody could tell her that and get away with it.

Plaintiff did not use a loud, nor boisterous, nor threatening tone nor volume; he was still with his head back swallowing water; if he had shouted, he would have sprayed water all over himself; his was a remark made in a quiet, theatrical whisper, made after a cool drink of water.

Before trial, scope was not an issue; the defense did not even list it in its pre-trial order; the district court was the first to bring it up, and then not until its findings and conclusions.

REASONS FOR GRANTING THE WRIT

1. The decision below confirming no scope conflicts with the decisions of this Court that the Jones Act, literally entitled "An Act for the Relief of Seamen," is remedial social legislation which should be interpreted liberally in favor of the seaman.

The Jones Act is remedial legislation which is to be given a benevolent interpretation, the seaman having no other damage remedy save unseaworthiness. *Cosmopolitan Shipping Co. v.*

McAllister, 337 U.S. 787 (1949), reh. d. 338 U.S. 839; *Cortez v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932).

Nowhere has it been given more liberal interpretation than when it casts vicarious liability upon the vessel. A taxi driver taking a seaman to the hospital, and obviously an independent contractor under any other law, becomes an agent of the vessel, making it liable for the carelessness of the taxi driver in causing an intersectional collision which adds additional injury to the seaman. *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966). See also *The Arizona v. Anelich*, 298 U.S. 110 (1936), reh. d. 298 U.S. 692; *Jamison v. Encarnation*, 281 U.S. 635 (1930).

Procedural matters which whittle away at substantive rights themselves become matters of substance; and while evidential matters are procedural, they become one of substance when they fall within this rule, ("Let me interpret the note of testimony, and I care not who interprets the law.") *Norfolk Southern Ry. Co. v. Ferebee*, 238 U.S. 269 (1915).

Suppose, instead of the vulgarity, plaintiff had said, "Ms. Cook, I hereby respectfully remonstrate with you that you should not complain because I lawfully approached a superior officer about a working condition I find grievous;" whereupon she knifes him. We strongly suspect the courts below would have found that the cook was in the course and scope. The two were feet apart. She knifed him immediately after his reply (which was not obscene nor profane, but merely vulgar). The failure to find course and scope cannot be squared with this Court's mandate of liberal construction.

Suppose petitioner had lost his life; his widow and children could be completely undone simply because of a vulgarity, possibly because he was not articulate enough to reply

properly; or was simply so vexed by the continued harassment of the cook that he did not keep still?

This is no laughing matter. Suppose he had turned to flee and she had stabbed him in the back, completely severing his spinal cord, causing total quadriplegia; since he would be at "maximum cure" the very date of his quadriplegia, he would not even be entitled to maintenance and cure, to say nothing of damages, no money at all; his family could go penniless in the streets. Yet the courts below have seemed to take lightly such considerations.

The intent of Congress and the intent of this Court in giving broad, liberal interpretation to the phrase making the vessel owner responsible for the acts of employees and agents is completely undone by a restrictive, narrow, negative evidential interpretation of course and scope; a failure to find scope evaporates the agent just as surely as if plaintiff had filed suit against the wrong defendant by mistake.

This is nothing to make light of. Crew members are trapped within the confines of the vessel. This decision strips them of protection simply because of anger.

In every case of injury inflicted in anger there is some personal element, except possibly in the case of a very cold-blooded assailant.

Now crew members may well feel that terror can reign unbridled; that aggravated assault can prevail unchecked of civil remedy. If the personal element generated by anger is enough to kill scope, then it is enough to kill any Jones Act remedy for assault.

A ship at sea is in a real sense a prison; the decisions here tend to make it a prison run by inmates gone amok.

As for the District Court's comment that the knifing did not "further the interest of the employer," what feloneous assault does, or does ***solely***? It was no longer a question of getting him to eat at regular hours but rather how disputes between ship's crew members should be adjusted. He was in fact saying, "I will go to the Master with my grievances about your work if I wish; now please be quiet and let me eat in peace;" and her reaction was at least in part an assertion to the contrary, that he should not go to the Captain.

It obviously benefited her employer dollar-wise to have everyone eating at the same time; and it particularly furthered her employer's interest (as a contract-caterer) to persuade crew members not to take complaints to the ship owner who (1) paid its money for the catering to be done as efficiently and economically as possible and (2) ***with as few complaints about the catering crew as possible; it wanted a good price and good peace, obviously***. Good will rested entirely on these two points: nobody likes to pay a premium for daily fare; and certainly nobody likes to hear gripes about the cook.

Excessive complaints would have gotten the catering concern run off as surely as the night follows the sun; so her attempt to keep him from going to the ship's officer was both for her own benefit and ***for the benefit of her employer***, the catering contractor, respondent herein, to keep it from losing its catering contract because of crew complaints about the cook and her staff.

Where the act is work-based in time, context and place, it is presumably in the course and scope unless it appears to be ***purely*** a personal matter; that a personal element is ***also*** present is of no moment:

> When an employee diverts from the straight-and-narrow performance of his task, the diversion is not an abandonment of his responsibility and service to his employer unless his act is so divergent that its very

> character severs the relation of employer and employee.

Wiebold Studio v. Old World Restorations, 484 N.E.2d 280, 19 Ohio App. 3rd 246 (1985).

> To escape liability an employer must show that when the wrongful act was committed, the employee had abandoned his employment and was acting for a purpose of his own ***which was not incident*** to his employment. [Emphasis added.]

Nichols v. United States, 796 F.2d 361 (10th Cir. 1986).

As Judge Hand pointed out, there is usually a combination of elements, personal and work, in an assault:

> **A principal is not chargeable with willful acts intended by the agent *only* to further his own interest, not done for the principal *at all*. . . . But motives may be mixed; men may vent their spleen upon others and yet mean to further their master's business; that meaning, that intention, is the test.** [Emphasis added.]

Nelson v. American West-African Line, Inc., 86 F.2d 730 (2nd Cir., 1936).

Our home courts have followed Judge Hand's ruling faithfully:

> When a dispute involving an employee erupts into violence, the question is whether it was "primarily employment-rooted" and regarded as "a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by ***purely*** personal con-

> siderations ***entirely*** extraneous to the employer's business interests."
> [Emphasis added.]

Johnson v. Dixon, 457 So.2d 79, 82 (La.Appl, 4th Cir., 1984).

How can the matter here be purely personal? This is not a case of a lovers' quarrel, nor sexual advancement upon a female employee; to the contrary, plaintiff was attempting to get a settlement of this work dispute for the obvious good of everyone–himself, the cook, the ship, the ship owner and most of all the respondent catering concern.

Certainly, in her provocation which caused plaintiff to utter the vulgarity, the cook was in the scope and course; and it was this provocation that was the real trigger and not plaintiff's reply in dismay. When she fussed for the ***second*** time (about his going to the ship's officer) she ***knew*** two things, and she could foresee them both: 1) that he probably would reply; and 2) his reply might not be very polite.

The District Court's comment that she did not reach for the knife until after the vulgarity proves too much; for she did not reach for it until after she had provoked him by her reprimand for his seeing the ship's officer. Eliminate the vulgarity, and she knifed him immediately after her rebuke concerning procedures for adjusting their differences about hours.

With the vulgarity gone, surely he would have recovered. He was provoked first by her to say what he did, and it was that provocation that triggered his; in a very real sense, she provoked herself to knife him; for if she had kept still, he would have too. He just did not walk in shouting vulgarities.

2. ***The ruling substantially diminishes the maritime protection of all seamen, who cannot leave the vessel, from aggravated battery that could be life-threatening.***

A conclusion of no scope is tantamount, in effect, to a conclusion of no battery unless the assailant happens to be a millionaire.

This is nothing to make light of. The man could have been paralyzed, killed, his children standing in the street to receive the pronouncement of no scope, no money. That he uttered this vulgarity is certainly no threat of bodily harm so apparently overwhelming, immediate and great that it justified her in an anticipatory knifing. The man was not even profane,* not even obscene; and certainly not as insulting in his vulgarity as he could have been by some epithets that are used by foul-mouthed men toward women. In dead seriousness, if he had said, "Kiss my gluteus maximus, " he would have only been technically vulgar.

And they laugh at us; laugh. What is so funny? If they had been knifed, it would not be so funny to them. It is elementary that the fact that the cook's reaction was excessive; not justified; against ship's orders; and unauthorized by the master is immaterial. It was done on ship's time, during the ship's work for the cook, in a ship work area, and about a ship work condition. If the term ***scope*** has any meaning whatever; if it is not merely a literary expression without any real impression, how can this case be out of scope? That she was angry? Then anger reins unbridled thousands of miles at sea.

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* The Circuit Court describes his remark as a "personal profane statement;" but we are not sure in what sense the Court uses the word *profane*; certainly it does not fit the normal dictionary definition. But certainly it sounds more sanctimoneous to call his remark profanity. (See last paragraph of opinion.)

In the Baton Rouge case, a man was dining with his guests in the most exclusive restaurant in Baton Rouge; his barbecued red snapper smelled unwholesome; he notified the waiter, who indicated that he would have to talk with the maitre; the maitre never came; the man gets up with the platter of barbecued red snapper and takes it over to the maitre; he is about seven feet tall, the diner is about five; he politely asks the maitre to smell the barbecued red snapper; instead the maitre takes the platter in both hands and breaks it over the man's head. All the barbecue sauce, all of the grease and melted butter run down into the man's hair and onto his forehead and into his eyes; this, right in front of his guests in one of the most staid, dignified restaurants in the State of Louisiana. The home court had no difficulty in finding that the act was in the scope despite the owner's protestations that he never authorized the battery; that it was against the rules; that the matter should have been handled in a completely different way; that the maitre knew this; but had simply made ***a purely personal matter out of it***. How would anybody like to be told, while the barbecue sauce is running off the end of their nose and dribbling into their mouth, that they are without remedy because of no scope just because they said, "Smell this stinking damned barbequed fish."

And another thing; every time we argued below, there seemed to have been a reaction that we were trying to justify the vulgarity; why, we are at a total loss to understand; with or without a law degree, who in the world would try to justify in a federal circuit court and before the staid Supreme Court of the United States, "kiss my ass?" To the contrary, it is simply this: that if he had said, "Madam, I pray thee, remonstrate no further; kindly allow me to eat in peace," plaintiff would have had his money for the knifing; there is no doubt in our mind. That we say that this man should recover does not make us a purveyor of vulgarity.

The question is simply this: Was it the intent of Congress that this man should go penniless because of such a vulgarity? Is that the liberal interpretation mandated by this Court? And mandated to such an extent that a ship is responsible for a taxicab?

*3. **The decision below makes the act of provocation an assumption of risk, totally barring recovery, although assumption of risk itself was totally barred as a defense by the 1939 amendments.***

The air was thick below with what we believe to be the, or a real, but silent rationale of the decision: provocation. And, likewise, we are not arguing that the vulgarity was not provocative; certainly it could have been, and surely it was. And, as provocation, it could certainly amount to comparative negligence proportionately diminishing plaintiff's recovery.

But to bar recovery totally because of provocation works an assumption of risk against the plaintiff. It is like saying in an FELA case, "The engineer assumed the risk of his own negligence; so even if he is merely ***comparatively*** negligent, the assumption of risk of his comparative negligence works a ***complete*** bar." The old ghost slips right in the back door again.

Like Kipling's soldier, seaman are certainly not plaster saints; and their talk leaves a lot to be desired. But we are firmly convinced here that the plaintiff was barred because the lower courts thought he had said something socially unacceptable; and, in the South, more than in any other area in the country, particularly unacceptable because a woman was involved. Therein lies the real bind.

This Court has ruled that matters of procedure will not be allowed to whittle away matters of substance under these employer's liability acts. And evidential rulings are matters of procedure, technically and properly speaking. But we think it is a matter of substance here, disgused as the evidential point; that the disguse is not intentional on the part of the courts below is immaterial; we believe the courts did not realize that in saying one thing, they were really meaning another: that provocation should be a complete bar, not merely a diminution; that a seaman assumes the risk of the slightest provocation on his part, no matter how tragic the result. We believe this more than anything we have ever believed about a lawsuit: that if he had said something socially acceptable (or if he had not said the socially unacceptable to ***a woman***), he would already have his money. May it be remembered that he did not cast foul epithets upon the cook; no obscenities, no profanities were used; certainly, he should have foregone the vulgarity, for it was vulgar, impolite, coarse and rude. But should he go penniless though maimed? That is the question.

Surely the provocation was not so large that it will make recovery literally an empty event even under a theory of comparative negligence; surely the cook's fault is not microscopic by comparison.

True, he could have said nothing; but he had been fussed at twice for no reason when he was right, and at a time when he wanted to sit down in peace and quiet and feed his face after he had been through a long routine that was so hectic that he had to catch food when he could;* in Kipling's words, he could not "sit long at his meat." First he was fussed at for feeding at odd hours; then for talking with his superior about it; both were completely within his rights and he was right about the matter. When she griped about the hours, he did not curse her nor slap her; he did what he was supposed

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* A very friendly family dog may become mean if someone reaches to take his food from him.

to do–go to his superior; and for that he gets fussed at again.

Surely he could have been more formal or articulate, but vulgarities occur with seamen because they occur with everybody with a limited vocabulary; they do not have the vocabulary to be articulate, and when they get angry they talk fast; and when they talk fast, they talk faster than they can think of proper language or search for the proper term.

True he could have been more diplomatic with euphemisms: "derriere," from the French, the very language of diplomacy, is easily substituted; but "kiss" presents more difficulty.

The unabridged Oxford dictionary devotes at least three columns to "kiss," but lists ***no*** synonyms; apparently kiss means kiss and nothing else does. The Oxford does list one synonym of sorts, but rather strange: Kiss may mean, verb or noun, to salute or a salute; a diplomat may kiss some high lady's hand as a salute; the Mardi Gras king may toss a kiss to a lady standing on the balcony as a salute to her.

But if he had said to the cook, "Salute my derriere," she would have merely stared at him incredulously, believing that he was somehow questioning her patriotism.

Not even the high-born use this synonym; can we really imagine the old aristocratic Southern planter saying, "Well, salute my derriere, Son, if it don't look like all this rain is going to rot every cotton boll y'all got." Who goes around talking like that?

Obviously, all he meant was that he would lawfully exercise his rights in a lawful manner any time he wanted to; but that phraseology does not come naturally to seamen.

(No matter what synonyms or euphemisms are used, the exhortation does not make a lot of sense in any form or fashion.)

We submit that the courts below really passed a moralistic judgment, that he said something socially unacceptable, and that he was the author of his own misery; and, psychologically unwittingly, that it did not matter whether it was within or without the scope, he should not recover because he was the sole provocateur. How can he be ruled the sole provocateur when she jumps on him about eating when he had a right to and then jumps on him again because of another right he exercises?

The Jones Act is to award for injury, not to inculcate in seamen the niceties of a Southern boarding school for girls.

This brings up the next psychological point. Suppose he had uttered his vulgarity to a big brawny man who was the cook? We firmly believe he would have had his money. In the South, it is usually believed that an upset woman guns down or knifes up a man only when there is some justified reason and that he probably got what he deserved, even when the facts are not known to the person considering the situation. It is sex discrimination in reverse, that females just do not act that way unless they are justified by some extreme provocation. They should be allowed to walk away without explanation. We are not trying to turn this into a civil rights case, but we firmly believe that if a big brawny male cook had been the one making stew meat out of Stoot, he would have already had his money. (Just as the Circuit Court expressly mentioned the vulgarity, it expressly mentioned that the cook was ***a woman***.)

Possibly this belief is valid in most instances; at least that is the Southern presumption. But the facts of this

instance are not unknown; how can it be proper for her to put plaintiff on a diet by whacking off hunks of him simply because he said that? And it is condescending to women to say that plaintiff should not recover because he should expect women to react that emotionally.

4. The decisions below do not give proper consideration to the fact that the FELA and the Jones Act do not even refer to course and scope; literally, it is not a requirement, and can only be placed there by interpretation or construction.

The statute 45 U.S.C. § 51 does not contain the words "course and scope," or anything similar. It simply says that the common carrier "shall be liable in damages to any person suffering injury ***while he is employed by such carrier*** . . . resulting in whole or part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or sufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed works, boats, wharves, or other equipment."

Nobody contends that plaintiff was not injured "while he was employed by such carrier." Obviously he was employed by the drill ship, and obviously he is at work when he rushes in to grab a bite so that he can rush back.

Literally, if he is at work and injured by a fellow employee, he is entitled to recovery.

We do not have to say that literalism should prevail. But it can be sensibly said that this statutory language means that in the interpretation of the evidence the Court should give

the broadest and most liberal interpretation it can in favor of finding course and scope.

Obviously, this lady was in the course and scope. she was the cook; she was in her kitchen; and they were discussing work conditions and the procedures about work conditions. *New Orleans, M. & R. Co. v. Hanning*, 82 U.S. 469 (1872).

How can a woman be out of scope in her own kitchen?

We believe that it was a vulgarity about a work condition, and the vulgarity alone, that decided this case against plaintiff; if it had been "kiss my foot, " we strongly believe plaintiff would have had his money. It was the vulgarity, ***ass***. (An ass is, literally, a humble but noble beast of burden who can far outdo a mule or a horse in many situations, whose name, for some unfathomable reason, has been denigrated.)

If plaintiff had stated, in the flowery language of diplomacy, "Ah, mademoisselle, saluez mon derriere, s'il vouz plait, mon chere," he would no doubt have his money; yet the one phrase is as coarse and common as the other. And he would have had his money even if she did not speak French.

There is nothing wrong with the word "kiss" or "my;" so for one word he is knifed and goes penniless? Obviously, he was to be punished for using the vulgarity and would have been punished by the courts below even if he had used it in ***an exclusory manner***: If he had said, "Oh, kiss my nose, kiss my toes, my fiery little lass, anything but my ass," he would have still lost the case, although he expressly directed the woman ***not*** to kiss his back sides since he used the vulgarity towards a woman; he should be punished for doing so. If he had expressly forbade the woman from doing so,

he would have still lost. This is how moralistic the law judgments of the Courts below seem to be.

(There is indication that what the cook said as she was knifing Stoot was relevant to the point; but if she had declared while stabbing him that she was not doing so in the course and scope of her employment, would that have made any difference?)

"Oh, it's Stoot this, and it's Stoot that, and it's Stoot, how's your soul?" But Stoot did not go to sea to have the courts save his soul. He is simply asking that he be given the protection that Congress intended. And we are not purveyors of filth because we seek it in a court of law.

SUMMARY

In all of our endeavors there is an element of personal motive whether we act for ourselves or for another. Who acts solely for the benefit of others? In our acts of charity we would like to think our motives are pure altruism, unsullied of selfishness. But that is not to be, at least not in this life. For this would be perfection on earth. In every beneficence there is at least a tinge of protective coloration whether done in favor of our family, our friends, our church, or our nation. For good or ill, self interest is larded into the most charitable deed. Plural motive is not a way of life upon this earth; it is life itself here.

But if such personal motive is to keep the act from being in course and scope, then the doctrine of ***respondeat superior*** is revoked across the board, a doctrine born before the Tenth Legion stood.

What would Judge Learned Hand say here—as astute a jurist in maritime matters as we could wish. Can there be any

doubt that he would see dual or plural interests here? His words haunt the District Court's rationale: *"But motives may be mixed; men may vent their spleen upon others and yet mean to further their master's business; that meaning, that intention, is the test."*

That the act does not truly forward anyone's interest is of no moment. The District Court says it did not forward the master's interest for the servant to knife Stoot. But was it in her interest to do so? If not, it has to be in furtherance of the master's enterprise; this is presumed; otherwise, every truck wreck would make the truck driver out of scope.

If we are to be literal here, then the knifing certainly solved the immediate problem for everyone's interest; Stoot will not go back into her kitchen to eat ***at any time***, even if given a chance. The District Court says the knifing did not solve the problem of Stoot's going into the kitchen and eating late. Yes it did; yes it did; if the District Court's literalism is relentlessly pursued, she will never have any further trouble with Stoot doing that.

Profound insanity would seem the litmus test here. Suppose that instead, it was the ***first*** time she had laid eyes on Stoot, but she suddenly went ***absolutely*** insane by any definition of the term and slit his throat from ear to ear because she hallucinated him to be Satan himself and heard a voice commanding her to destroy him; no prior arguments, no prior contentions whatever; what then? Obviously her employer would be vicariously liable under ***respondeat superior*** although she were incapable of forming any intent to further any interest in anything. Suppose a truck driver goes stark raving mad at the wheel and similarly runs down pedestrians; surely his employer would have to respond although the driver was incapable of lawful intent to further any interest; the presumption would obtain.

We strongly believe that Stoot would have had his money if the case had not occurred in the South; or the cook had not been a woman; or he had not uttered the vulgarity. It appears that if he had used milder, moderate and mellifluous language, and she had still knifed him, he would have won. But such moderation in all logic would seem to place her act farther from scope, because it would make it more irrational; if he had said, "Please do not protest any more; let me eat in peace, please," and she had knifed him, he would have had his money; yet the knifing would have been that more irrational because of the moderate language, and, thus, seemingly that more farther from course and scope of employment.

Again, the vulgarity was provocative; but since she provoked it, she provoked her own act; and thus she stands as the proverbial young man who pleads with the Court for mercy on a poor orphan boy after he kills his parents. This is consistent with the benevolent interpretation mandated by this Court? More than all else, this generates our head-shaking dismay.

Whether the master should respond for agravated assault should involve more of the note of evidence than the moment the blade penetrates. Such snapshot solutions are not penetrating enough.

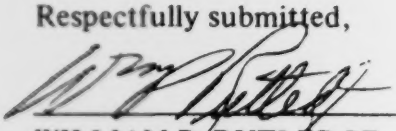
Here the assailent was certainly in scope when she tried to save her job—and her company's catering contract—by shaming Stoot into refraining from going to the ship again with complaints. For the ship will not tolerate many complaints about the galley before the caterer is gone; and the merits of the crew's gripes are rarely inquired into: if they do not like the cook, the caterer has to go. The ship will not debate the crew over the quality of a contract-cook; she goes; and if it happens again the catering company goes too.

The rational below is too literal, too superficial to properly serve reality. The comment that plaintiff testified that she knifed him because of his "profanity," is singularly unimpressive. ("Professor, why did Senator Clagghorn lose the election?" "Why? Because he did not get enough votes. Next question.") And if the purpose here is not to sensibly serve the realities of the maritime trade, then what purpose does it have? And the Jones Act is part of that trade.

CONCLUSION

With or without hearing, the judgment of the Court of Appeals for the Fifth Circuit should be reversed with mandate that any provocation merely be considered in diminution of damages.

Respectfully submitted,



WILLIAM P. RUTLEDGE
of
DOMENGEAUX & WRIGHT
P.O. BOX 3668
LAFAYETTE, LOUISIANA 70502-3668
TELEPHONE: (318) 233-3033
COUNSEL FOR PETITIONER

APPENDICIES

APPENDIX A

Joseph Robert STOOT,
Plaintiff-Appellant,

v.

D & D CATERING SERVICE, INC.,
Defendant-Appellee.

No. 85-4737.

United States Court of Appeals,

Fifth Circuit.

Jan. 15, 1987.

Crewman sought to recover from labor service contractor for injuries he received when contractor's employee stabbed him. The United States District Court for the Western District of Louisiana, 618 F.Supp. 1274, Earl E. Veron, J., found for defendant, and plaintiff appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) independent contractor had vicarious responsibility for wrongful acts of employees in course of their employment, and (2) sufficient evidence supported finding that contractor's employee was acting beyond course and scope of her employment when she struck crewman.

Affirmed.

1. **Master and Servant KEY 302(1)**

Catering service which was independent contractor on ship had vicarious responsibility for wrongful acts of its employee in assaulting crewmember if employee was acting in course and scope of her employment.

2. **Master and Servant KEY 330(3)**

Finding that caterer's employee intentionally assaulted ship crewman was not clearly erroneous; evidence as to whether attack on crewmember was unprovoked was conflicting.

3. **Master and Servant KEY 330(3)**

Caterer's employee's action of attacking ship crewmember with a knife was motivated by her anger and revenge following crewmember's personal profane statement to her, rather than for reasons related to her employment, and thus was outside course and scope of her employment.

Appeal from the United States District Court for the Western District of Louisiana.

Before GARZA, DAVIS and JONES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Joseph Stoot appeals a take nothing judgment rendered in favor of D & D Catering Service, Inc. (D & D Catering), in his general maritime law action for personal injuries. We affirm.

I.

Joseph Stoot was injured while employed by Fluor Drilling Services, Inc. (Fluor) as a derrickman aboard the MR. DAVE, a jackup drilling rig, located twelve miles off the Texas coast. The MR. DAVE was owned by intervenor, Fluor, and most of the personnel working aboard the vessel were Fluor employees. Fluor contracted with D & D Catering, however, to provide the food service on the vessel and D & D employees

performed the cooking and other work related to this contract. Stoot's assigned duties frequently prevented him from eating during regular meal hours and on these occasions Stoot reported to the galley early for his meals. Eloise Porter, D & D's chief cook, objected to giving Stoot his meals at these irregular times and complained to Stoot about the inconvenience. Stoot reported Porter's complaints to the Fluor toolpusher or supervisor, who in turn instructed Porter that she was required to give Stoot his meals at the irregular times. Porter later confronted Stoot in the galley about making trouble for her with the toolpusher. She told Stoot that "he was nothing but a trouble maker." According to the district court, the following then occurred:

> Without giving plaintiff an opportunity to deliver a retort, Porter marched back into the kitchen. Plaintiff then went to the ice machine in the dining area, turned and told Porter, "Kiss my ass," whereupon Porter came out of the kitchen into the dining area wielding a carving or butcher knife and replied that, "Nobody tells me to kiss their ass." In the ensuing encounter Porter swung the knife at the plaintiff, severing the third and fourth digits, and lacerating the fifth digit of the plaintiff's right hand.

Stoot's suit against Porter's employer, D & D Catering, followed.

The district court, 618 F.Supp. 1274, following a bench trial, found as a matter of law that an independent contractor who supplies the galley crew for a vessel cannot be held vicariously liable for the acts committed by its employees while working as a member of the vessel's crew. Alternatively, the court held that even if D & D Catering was vicariously

responsible for Porter's actions, Porter was not acting in the course and scope of her employment when she struck Stoot.

Stoot raises two issues on appeal: (1) the district court erred in holding that D & D Catering is not, as a matter of law, vicariously responsible for Porter's actions; (2) the district court's conclusion that Porter was not acting within the course and scope of her employment with D & D is not supported by the record. Intervenor, which seeks to recover maintenance and cure benefits it paid to Stoot, joins Stoot in this appeal.

II.

A.

We agree with the appellant that the district court erred in concluding that D & D Catering as a matter of law has no vicarious responsibility for wrongful acts of its employees. The recognized principle of agency law that imposes vicarious liability upon employers for wrongful acts committed by employees while acting in the course of their employment is well ingrained in the general maritime law. *Kelly v. Smith*, 485 F.2d 520 (5th Cir.1973); *Baggett v. Richardson*, 473 F.2d 863, 864-65 (5th Cir.1973); *Offshore Logistics v. Astro-Marine, Inc.*, 482 F.Supp. 1119, 1121 (E.D.La.1980).

Hartsfield v. Seafarers International Union, 427 F.Supp. 264 (S.D.Ala.1977), relied upon by the appellee is readily distinguishable. The court in *Hartsfield* held that a labor union was not vicariously responsible for an assault by one of its members who had used the union's referral service to obtain a job on a vessel. This holding does not support the conclusion that an employer is not vicariously responsible for the wrongful acts of its employees.

[1] The district court correctly observed that most reported cases that have been brought by seamen for injuries suffered from an assault by a fellow crewmember have been analyzed and decided on a theory of whether the shipowner's warranty of seaworthiness has been breached. *Boudoin v. Lykes Bros. Steamship Co.*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955); *Claborn v. Star Fish & Oyster Co., Inc.*, 578 F.2d 983 (5th Cir.1978). It does not follow, however, that D & D Catering, as employer of Porter, had no liability to Stoot because they did not own the MR. DAVE and consequently did not owe the warranty of seaworthiness. We see no reason why Stoot's election not to sue Fluor for the unseaworthiness of the MR. DAVE should protect D & D Catering from vicarious liability for its employee's wrongful act. D & D Catering did not argue and the district court did not find that Fluor was Porter's borrowing employer; consequently no legitimate reason is advanced why ordinary agency principles would not operate to impose liability on D & D Catering for Porter's wrongful act if Porter was acting in the course and scope of her employment.

B.

Stoot next contests the district court's finding that Porter was acting beyond the course and scope of her employment when she struck Stoot. Before addressing this question directly, we must first consider whether the pleadings and contentions of the parties precluded the district court from finding that Porter intentionally assaulted Stoot.

[2] Although appellant asserts that both parties presented this as a negligence case we are satisfied that the district court's finding that Porter intentionally assaulted Stoot is not clearly erroneous. The plaintiff's petition is equivocal; in paragraph IV plaintiff alleged that Stoot was "viciously attacked without provocation by Eloise Porter." Stoot

adduced evidence in support of this allegation. Stoot testified that Porter approached him with the knife and made a swing at him while saying "I got something for your ass." Although Porter contended she swung the knife as a reflexive reaction when Stoot kicked her, the district court was entitled to accept Stoot's testimony over that of Porter's. Stoot's decision that it is now in his best interest to agree with D & D Catering that Porter's actions were not intentional does not undermine the district court's finding of an intentional tort. Wright & Miller, *Federal Practice and Procedure* § 2664 (1977).

Appellant next argues that the evidence does not support the district court's findings that Porter acted beyond the scope of her employment with D & D Catering when she struck Stoot with the knife. After a careful review of the record, we conclude that the finding challenged by appellant is not clearly erroneous. Fed.R.Civ.P. 52(a).

Although whether a given act by an employee is committed within the course and scope of his employment is highly factual, the facts must be analyzed within the framework of established agency principles.

The Restatement (Second) Agency § 245 provides:

> A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant.

Comment C. of § 245 provides:

> The master, however, is relieved from liability under the rule stated in this Section if the

> servant has no intent to act on his master's behalf, although the events from which the tortious act follows arise while the servant is acting in the employment and the servant becomes angry because of them.

See also Offshore Logistics v. Astro-Marine, Inc., 482 F.Supp. 1119, 1121 (E.D.La.1980).

Both Stoot and Porter testified that they initially disagreed and argued about Stoot's practice of reporting to the dining area for meals at irregular times. This argument escalated after the Fluor toolpusher directed Porter to give Stoot his meals early. On the morning of the accident Porter told Stoot in no uncertain terms how displeased she was that Stoot involved the toolpusher in their disagreement. The argument became heated and culminated with Stoot's profanity and Porter's attack. Stoot testified that his profanity provoked Porter to attack him with the knife. Jesse Wallace, a roughneck on the MR. DAVE, testified that several minutes after Porter cut Stoot she said "I don't ever want you to ever tell me to kiss your ass again. Nobody tells me that."

[3] Although admittedly this is a close case, we believe that the district court was entitled to find that Porter was motivated to cut Stoot from anger and revenge following Stoot's personal profane statement to her rather than for reasons related to her employment. This finding supports the district court's conclusion that Porter's action was outside the course and scope of her employment. *Palmer v. Apex Marine Corp.*, 510 F.Supp. 72, 74 (W.D.Wash.1981); *Offshore Logistics v. Astro-Marine, Inc.*, 482 F.Supp. 1119, 1121 (E.D.La.1980); *Posey v. Fabre*, 369 So.2d 237 (La.App. 4th Cir.), *writ denied*, 371 So.2d 1344 (La.1977).

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

IN THE UNTIED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-0887

JOSEPH ROBERT STOOT

VS.

D & D CATERING SERVICE, INC.

FILED: SEP 30, 1985

FOR THE PLAINTIFF	Anthony D. Moroux Domengeaux & Wright P.O. Box 3668 Lafayette, LA 70502
FOR THE DEFENDANT	Norman P. Foret McBride, Foret, Rozas & Leonard P.O. Box 2700 Lafayette, LA 70502 Scott E. Delacroix & Lawrence E. Abbott Hebert & Abbott 400 Lafayette Street New Orleans, LA 70130

VERON, J.

MEMORANDUM OPINION

In this suit, Joseph Robert Stoot seeks recovery from D & D Catering Service, Inc. under the General Maritime Law. Fluor Drilling Services, Inc. and its compensation insurer, Hartford Accident & Indemnity Company, have intervened for reimbursement for compensation and medical benefits paid to and on behalf of plaintiff. The matter came on before this Court, without a jury, on December 12, 1984.

FINDINGS OF FACT

On April 18, 1982, the plaintiff, Joseph Robert Stoot, was employed as a derrickhand aboard the vessel "Mr. Dave," a jackup drilling rig located approximately 12 miles offshore from Corpus Christi, Texas. The Mr. Dave was owned and operated by the intervenor, Fluor Drilling Services. Also employed aboard the Mr. Dave was Eloise Porter, a cook who was in control of the galley and had served the vessel by and through her galley services since November 3, 1981. Both plaintiff and Porter were crewmembers of the Mr. Dave. While Porter served the vessel over the course of several months prior to April, 1982, she was generally employed by D & D Catering Services, Inc., a labor service contractor and the sole defendant herein.

According to the testimony of Porter, the only other employees of D & D Catering aboard the rig were a galleyman, a bedroom man, and a night cook, along with a steward's helper. Porter had no supervisor or superior employee of defendant on board the vessel with her to exercise any degree of direct control over her day-to-day activities.

The plaintiff and Porter had been in contact since Porter was first assigned aboard the rig in November of 1981 and apparently enjoyed a casual and uneventful relationship until shortly before April 18, 1982. Problems arose between the two when the plaintiff began to work an earlier shift than usual, causing him to request meals from the galley at irregular hours. Porter apparently objected to feeding plaintiff at irregular hours and plaintiff reported this difficulty to Mr. Jaubert, his toolpusher. As a result, the toolpusher thereafter spoke directly to Porter about the situation, causing her to become upset.

On April 18, 1982, Porter and plaintiff had an altercation in the galley. When plaintiff entered the galley that morning just before 10:30 A.M., Porter told the plaintiff that he was "nothing but a troublemaker" because he had complained to his toolpusher, Jaubert about her not wanting to feed plaintiff at irregular hours. Without giving plaintiff an opportunity to deliver a retort, Porter marched back into the kitchen. Plaintiff then went to the ice machine in the dining area, turned and told Porter, "Kiss my ass," whereupon Porter came out of the kitchen into the dining area wielding a carving or butcher knife and replied that, "Nobody tells me to kiss their ass." In the ensuing encounter, Porter swung the knife at the plaintiff, severing the third and fourth digits, and lacerating the fifth digit of the plaintiff's right hand.

The plaintiff was flown by helicopter to the Memorial Medical Center in Corpus Christi, Texas, where the distal joint of his right ring finger was amputated and lacerations of his third and fifth digits were also treated. Plaintiff's third digit was partially amputated in January, 1982 and surgery was subsequently performed on his right hand on four additional occasions. The medical testimony shows that the plaintiff has been left with a forty-four percent disability of his right hand as a result of the knife slash.

CONCLUSIONS OF LAW

I. This action is brought pursuant to the General Maritime Law of the United States and this Court is vested with subject matter jurisdiction pursuant to 28 U.S.C. § 1333.

II. The plaintiff's cause of action fails to state a claim upon which relief can be granted under the General Maritime Law because recovery under the facts of this case may be had only against the vessel owner or operator.

A. The plaintiff's complaint seeks to hold the defendant vicariously liable for the assault of its general employee, Eloise Porter, upon plaintiff. While assigned by her general employer, defendant D & D Catering, aboard the Mr. Dave, Porter was a crewmember serving as galley cook in the furtherance of the vessel's mission. As a crewmember, any negligent actions on the part of Porter are traditionally charged to the owner or operator of the vessel for which Porter served.[1] In this case, however, plaintiff has already received $23,821.84 and has had medical expenses in the amount of $19,125.46 paid by his employer, Fluor Drilling Services, Inc. and its insurer, Hartford Accident & Indemnity Company, intervenors herein. As plaintiff's employer, Fluor, is both the owner and operator of the drilling vessel, Mr. Dave, it is the entity against which plaintiff has the traditional maritime remedies of vessel unseaworthiness and/or Jones Act negligence.[2] Having already been compensated by Fluor, however, plaintiff seeks to recover further damages from D & D Catering, which apparently assigned Porter aboard the Mr. Dave pursuant to an agreement[3] with Fluor.

The novel question thus presented by this case is *not* whether Porter acted or intended to act on the vessel's

behalf by assaulting plaintiff, but rather whether Porter acted within the course and scope of her employment with defendant, D & D Catering, by assaulting the plaintiff. After the parties submitted post-trial memoranda on the standard to be applied in determining whether the actions of Porter were within the course and scope of her employment, it became abundantly clear that no such standard exists under the General Maritime Law because the cause of action asserted by the plaintiff has never been recognized under the General Maritime Law.

This Court has found only one case where the remedy for an injury sustained from an assault upon a seaman by a fellow crewmember was sought under the General Maritime Law against a party other than the vessel owner or operator. In *Hartsfield v. Seafarers International Union*, 427 F.Supp. 264 (S.D. Ala. 1977), the personal representative of a fatally assaulted seaman brought suit against the labor union that had allegedly undertaken the duty of supplying a crew to the vessel S.S. "Eagle Warrior," alleging that it negligently performed that duty in causing an individual to be a crewmember when it knew or should have known that that individual was unstable and dangerous to his fellow crewmembers, and that said negligence proximately caused the death of plaintiff's decedent. In noting that a labor organization is not in any position to supervise a crewmember while at sea, the Court recognized that the cause of action asserted by the plaintiff had no basis under the General Maritime Law.

> A seaman who is assaulted may, under proper circumstances, recover damages for breach of the warranty of seaworthiness. *Boudoin v. Lykes Bros. Steamship Co.*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955). However, recovery in such a case may be had only

> against the vessel owner or operator. *The history of litigation arising out of an assault by a fellow crewmember, whether the theory of liability has been unseaworthiness, negligence or respondeat superior, has dealt with the liability of SHIPOWNER to the injured seaman. Hartsfield, supra* at 268, *citing* Annotation, 99 L.Ed. 359 (emphasis added).

Thus, it is clear that the General Maritime Law has never recognized a cause of action against any party, apart from the vessel owner or operator, seeking damages resulting from an assault perpetrated by a fellow crewmember. *Id.*; *but c.f.*, *Baggett v. Richardson*, 342 F.Supp. 1024 (E.D. La. 1972) (wherein a cause of action was recognized under the General Maritime Law for an assault by persons who were *not crewmembers* of the vessel perpetrated upon the vessel's captain).[4]

B. The plaintiff nevertheless contends that because the admiralty law uses principles of the common law to fix its liability, *Daigle v. Point Landing, Inc.*, 616 F.2d 25 (5th Cir. 1980), this Court should apply common law principles of respondeat superior to find the defendant vicariously liable for the assault perpetrated by Porter. The General Maritime Law incorporates the general law of torts, however, only when doing so would not be inconsistent with the law of admiralty. *Harrison v. Flota Mercante Grand Colombia S.A.*,[5] 577 F.2d 968, 977 (5th Cir. 1978); *Spinks v. Chevron Oil Company*, 507 F.2d 216, 222 n.8 (5th Cir. 1975). It is a fundamental principle of the maritime law of the United States that it is to be uniform throughout the country. All of those cases brought under the General Maritime Law in which recovery has been awarded to a seaman for injuries sustained as a result of an assault by a fellow crewmember have been had *only* against the vessel owner or operator, usually involving a finding of unseaworthiness of the vessel

as a result of the unfit nature of the crewmember perpetrating the assault. *See, e.g., Clevenger v. Starfish & Oyster Co.*, 325 F.2d 397 (5th Cir. 1963). In *Clevenger*, the Fifth Circuit Court of Appeals, noting that the warranty of seaworthiness extending from the shipowner has its roots deep in maritime history, held that a savage assault with a meat cleaver or similarly dangerous weapon by one crewmember upon another does, as a matter of law, constitute a breach of the warranty of seaworthiness. *Id.* at 402. The Court further noted that "when the action for unseaworthiness is available, its notion of liability swallows up any notion of maritime negligence, no matter how leniently conceived." *Id.* The shipowner's duty to provide a seaworthy vessel, including a crew equal in disposition and seamanship to the ordinary person in the calling, is absolute and nondelegable. *Id.* at 400; *The Rolph*, 299 F. 52, 55 (9th Cir. 1924).

Because it is the *shipowner's* duty to control his crew that is so deeply rooted in federal maritime law, it would upset the uniform and harmonious application of that law to recognize a cause of action against a general labor service contractor in the circumstances of this case. The common law doctrine of respondeat superior is based upon the long-established policy that persons are bound to conduct their affairs so as to not cause injury to another, and if a person undertakes to manage his affairs through his employees, he remains bound to manage them so that third persons are not injured while his employees are engaged upon his business and within the scope of their authority. *See, e.g.*, 35 Am.Jur. § 543 at p. 974. As explained long ago by Lord Chief Justice Best, "The maxim of respondeat superior is bottomed on this principle: that he who expects to derive an advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." *Hall v. Smith*, 2 Bing. 156, 130 Eng. reprint 265, *cited in* 35 Am.Jur. § 543 at p. 975. In accordance with the doctrine, it has been

recognized that some power to control the acts of the wrongdoer must have been vested in the employer at the time of the injury. *Id.* It is this concept of "control" which dictiates that a seaman's right of recovery for an injury caused by an assault perpetrated by a fellow crewmember should be had only against the shipowner in the circumstances of this case.

In the case at bar, Porter was a crewmember of the Mr. Dave, having served aboard the vessel from November 4, 1981 up until the date of the assault on April 18, 1982. According to the deposition testimony of Porter, she had no supervisor or superior employee of defendant on board the vessel with her to exercise any degree of direct control over her day-to-day activities.[6] Moreover, she was utilizing facilities of the vessel galley and was furthering the mission of the vessel by her employment. Additionally, it has been well observed that "[those] engaged in the operation of a vessel on the high seas work under conditions of close confinement which tend to breed irritations and sharp tempers such as are not usually encountered in employment ashore." M. Norris, The Law of Seaman § 30:35, at p.490 (4th ed. 1985). As noted by Judge Learned Hand in *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815 (2d Cir. 1953), "Sailors lead a rough life and are more apt to use their fists than office employees." Under these circumstances, it would be entirely inappropriate to impose a duty of control, pursuant to the policies underlying the doctrine of respondeat superior, upon a general labor service contractor for an assault perpetrated by a person whom it provided for assignment aboard a vessel several months earlier. No case authority to date has imposed such a duty of control upon anyone other than the vessel owner or operator, and this Court does not find it appropriate to do so under the facts of the case at bar.

III. Even if this Court were to recognize a cause of action under the doctrine of respondeat superior by the injured

seaman against the defendant labor service contractor, the action of Porter in assaulting plaintiff with the large kitchen knife was not within the course and scope of her employment. Although the origin of the dispute between plaintiff and Porter concerned the plaintiff's requests to be fed at irregular hours, the apparent motivation of Porter in picking up the knife and waving it at plaintiff was because, as plaintiff relates the words of Porter as she approached him with the knife, "Nobody tells me to kiss their ass." As related in the deposition testimony of Porter:

> Q. And it is your testimony that you did not grab the knife until he told you to kiss his ass?
>
> A. Definitely not.

As such, the Court holds that Porter's knife assault upon plaintiff was motivated for purely personal reasons in order to satisfy her own spite after having been told to kiss plaintiff's ass.

In the case of *Palmer v. Apex Marine Corp.*, 510 F.Supp. 72 (W.D. Wash. 1981), the plaintiff, Palmer, sued the *vessel operator* under the General Maritime Law for injuries sustained to his finger as a result of a fight with a fellow crewmember by the name of Brown. Apparently there had been a longstanding dispute between Palmer and his fellow crewmember Brown as to the tardiness of Palmer in relieving Brown from his watch. The Court found that "[Palmer's] acts of relieving Brown late was the main cause of the friction . . . which eventually ignited into a fight. . . ." *Id.* at 73. Nevertheless the Court held:

> Findings of "course and scope" are based on the attacker's intent, warped or otherwise, to

> act for the ship .... There is no allegation, and no reasonable argument could be made, that Brown acted or intended to act on the ship's behalf by fighting with Palmer. Therefore, this theory must fail as a matter of law." *Id.* at 74.

The Court finds the *Palmer* case to be persuasive. Also, those cases seeking to impose vicarious liability under the Jones Act apply a test which is similar to that employed in *Palmer*, which was brought under the General Maritime Law. As stated by the Second Circuit Court of Appeals in the oft-cited case of *Walters v. Moore-McCormak Lines, Inc.*, 309 F.2d 191 (2d Cir. 1962):

> The test to be employed is whether *the attack* was with the intention of furthering the personal interests of the assailant or the interests of the employer. *Id.* at 195. *See also Lambert v. Morania Oil Tanker Corp.*, 677 F.2d 245 (2d Cir. 1982).

Because the assault upon plaintiff was simply a wanton act, done to satisfy the employee's temper and spite, the employer cannot be held vicariously liable.

Plaintiff nevertheless contends that the Court should apply the general state law test for vicarious liability in such situations as that embodied in the Louisiana Supreme Court case of *Lebrane v. Lewis*, 292 So.2d 216 (La. 1974). In *LeBrane*, the supervisor stabbed one of his employees after the employee had been fired and while the supervisor was escorting the fired employee off of the employment premises. The Court held that the stabbing

> ... occurred while the employee was at least partially actuated by his purpose of acting for

> his employer in the dischage of the recalcitrant co-employee [citation omitted], and it was reasonably consequent upon or incident to [the supervisor's] performance of his employment function of hiring and firing sub-employees [citation omitted]. *Id.* at 219.

Even if this Court were to find some basis for the application of state law, no reasonable argument can be made that Porter was attempting to get plaintiff to eat in the galley only at scheduled meal-times when she incidentally lacerated his fingers with the knife.

Upon its foregoing consideration of the facts of this case and the established General Maritime Law, the Court accordingly grants JUDGMENT FOR DEFENDANT.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 30th day of September, 1985.

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

FOOTNOTES

1. See the discussion at II.B., *infra*, regarding the claim of unseaworthiness as the traditional remedy where a seaman has been assaulted by a fellow crewmember.

2. These remedies would be premised upon the fact that Porter was a crewmember of Fluor's vessel and was Fluor's borrowed employee. The law is well-settled that a seaman oftentimes may have more than one employer, i.e., in those instances where she acts as a "borrowed servant." *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 224-26 (5th Cir. 1975). See discussion, *infra* at note 6 and accompanying text. Apparently, no cause of action for the negligence of Porter as Fluor's borrowed employee, or for the unseaworthiness of the Mr. Dave was ever asserted by plaintiff against Fluor.

3. No evidence whatsoever was presented to this Court as to the existence of or terms of any specific written or oral agreement between defendant D & D Catering and Fluor Drilling Services.

4, Of course, the vessel owner is not liable for the malicious acts of a stranger, i.e., one not a member of the vessel's crew. *Campbell v. Penn. R.R. Co.*, 85 F. 462 (2d Cir. 1898), *cited in* 2 BENEDICT ON ADMIRALTY § 11 n.7.

5. There is no inconsistency between admiralty law and the common law in product liability situations, such as recognizing the duty of the seller of a product to warn of those dangers which are reasonably forseeable and of which the plaintiff cannot reasonably be expected to be aware. *See, e.g., Harrison, supra* at 977.

6. The importance of "control" over the employee-crewmember has been recognized in cases arising under the Jones Act in determining who is the Jones Act employer of a "borrowed servant." In *Roberts v. Williams-McWilliams Co.*, 648 F.2d 255 (5th Cir. 1981), plaintiff was employed by Gibson, a labor service company, and was sent to the Williams-McWilliams barge to do welding work. While assigned aboard the barge, plaintiff was injured. In holding Williams-McWilliams to be liable for plaintiff's injury under the Jones Act, the Court noted: "During his work, Roberts was under the complete control of Williams as no Gibson foreman was assigned to the shift on which he worked." *Id.* at 262.

For other factors to be evaluated in determining whether an employee is to be considered a borrowed employee of another, see *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir. 1969). It is important to note, however, that "no fixed test is used to determine the relationship." *Champagne v. Penrod Drilling Co.*, 341 F.Supp. 1282, 1284-85 (W.D. La. 1971), *aff'd* 459 F.2d 1042 (5th Cir. 1972).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-0887

JOSEPH ROBERT STOOT

VS.

D & D CATERING SERVICE, INC.

FILED SEP 30 1985

J U D G M E N T

For written reasons assigned this date;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, D & D Catering Service, Inc. and against the plaintiff, Joseph Robert Stoot, dismissing the suit at plaintiff's cost.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 30th day of September, 1985.

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE